

# Catholic University Law Review

---

Volume 19 | Issue 4

Article 2

---

1970

## The Anatomy of Boulwarism with a Discussion of Forkosch

Irving Abramson

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Irving Abramson, *The Anatomy of Boulwarism with a Discussion of Forkosch*, 19 Cath. U. L. Rev. 459 (1970).

Available at: <https://scholarship.law.edu/lawreview/vol19/iss4/2>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# The Anatomy of Boulwarism with a Discussion of Forkosch

IRVING ABRAMSON\*

After nine years of litigation it has finally been held that Boulwarism as practiced by the General Electric Company during the 1960 negotiations with the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE), was an unlawful method of bargaining.<sup>1</sup>

## *Prefatory Statement*

The National Labor Relations Board had found GE guilty of violating its duty to bargain in four areas of conduct:

- (1) Its failure to furnish the union with certain information during contract negotiations.
- (2) Its attempts to deal separately with locals on matters that were properly the subject of national negotiations and its solicitation of locals separately to abandon or refrain from supporting the strike.
- (3) Its presentation of an insurance proposal to the union on a take-it-or-leave-it basis.
- (4) The overall approach to and conduct of bargaining dubbed "Boulwarism."<sup>2</sup>

This paper will concern itself only with the last of the enumerated issues—the Boulware method of bargaining—which sired the "fair, firm" offer, in effect the equivalent and alter ego of "take-it-or-leave-it," about which there has been no dearth of literature.<sup>3</sup> The Intermediate Report

---

\* General Counsel, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC. LL.B., St. John's School of Law, 1930; Member New York bar.

1. NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969) *enforcing* 150 N.L.R.B. 192 (1964), *cert. denied* 90 S. Ct. 995 (1970), *petition for rehearing denied*, — S. Ct. — (1970). The hearing consumed 10,000 pages of testimony and a massive number of exhibits. The Intermediate Report which contained 85 pages included an exhaustive analysis of GE's method of bargaining since Boulware spawned it in 1948.

2. NLRB v. General Elec. Co., 150 N.L.R.B. at 193.

3. See, e.g., L. BOULWARE, THE TRUTH ABOUT BOULWARISM (1969); J. HEALY,

contained 26 separate bad faith findings related to GE's conduct during the negotiations.<sup>4</sup> While those findings may properly be used as ingredients in a finding of overall bad faith, they will not be considered in this paper in evaluating Boulwarism as a bargaining technique. They will be dealt with only to describe the Boulware method wherever the conduct would appear to be part of the Boulware *modus operandi*.

The reader is put on notice that the writer personally sat at the negotiating table with GE and represented the contending union in its attack on Boulwarism. The writer makes no pretense at nonpartisanship. After many months of exposure at the "bargaining" table with GE no one but an intellectual eunuch may claim to deal dispassionately with the issues of Boulwarism. The writer, however, will make a fitting effort to transcend an intimate personal experience with Boulwarism in order to treat the subject as objectively as possible.

The ultimate but penumbral holding of the court was that "an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken."<sup>5</sup> Before stating the majority holding, Judge Kaufman, in what appears to be an attempt to reassure Judge Friendly (dissenting) explicated: "We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the 'best offer first' bargaining technique is forbidden."<sup>6</sup> The court's holding as above stated related to GE's overall failure to bargain in good

---

CREATIVE COLLECTIVE BARGAINING 58 (1965); H. NORTHRUP, BOULWARISM, THE LABOR RELATIONS POLICIES OF THE GENERAL ELECTRIC CO., THEIR IMPLICATIONS FOR PUBLIC POLICY AND MANAGEMENT ACTION (1964); Blum, *Collective Bargaining: Ritual or Reality*, 39 HARV. BUS. REV. 63 (1961); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Duvin, *The Duty to Bargain: Law In Search of Policy*, 64 COLUM. L. REV. 248 (1964); Forkosch, "Take It Or Leave It," *As A Bargaining Technique*, 18 LAB. L.J. 676 (1967); Marcus, *The Employer's Duty to Bargain: Counterproposal v. Concession*, 17 LAB. L.J. 541 (1966); Selekman, *Cynicism and Managerial Morality*, 36 HARV. BUS. REV. 61 (1958); *Boulwarism—Legality and Effect*, 76 HARV. L. REV. 807 (1962); *Collective Bargaining*, 43 TEXAS L. REV. 974 (1965); N.W.U. L. REV. 40 (1968); 40 N.Y. L. REV. 798 (1965).

4. In addition to an overall finding of bad faith, NLRB v. General Elec. Co., 150 N.L.R.B. at 269, the Trial Examiner made the following bad faith findings *inter alia*: misrepresentation of union proposals, *id.* at 215, 216; failure to tender cost information, *id.* at 261; activities to undermine the union as bargaining agent, *id.* at 263; separate dealings during negotiations with fractions of bargaining unit, *id.* at 264; haste in releasing offer directly to employees and to other unions, *id.* at 271; unilateral determination of employment terms, *id.* at 272; attacking union and its leadership with misrepresentations of fact, *id.* at 276; presenting to employees different arguments from those presented at bargaining table, *id.* at 277; playing on fears and insecurities of employees, *id.* at 277; communication system designed to undermine employee faith in union leadership and bargaining process, *id.* at 277; for others see *id.* at 279, 282, 283.

5. 418 F.2d at 762.

6. *Id.*

faith, *i.e.*, the Boulware charge.<sup>7</sup> Judge Kaufman's reference to the "take-it-or-leave-it *method*" (Emphasis added) in his holding supports the Board's finding that GE's overall bargaining method was predicated on its threshold "take-it-or-leave-it" attitude, even though it went through the motions of bargaining.<sup>8</sup> Although the overall bargaining charge involved GE's use of the "fair, firm offer,"<sup>9</sup> Judge Kaufman's reference to the "take-it-or-leave-it" and the "fair, firm" offer was a recognition of one as *de facto* equal to the other.<sup>10</sup>

Both the Board and court decisions leave some questions unanswered. Albeit the Board found GE's "overall conduct" violated its duty to bargain<sup>11</sup> as mandated by the law,<sup>12</sup> would any one or more parts of the Boulware technique separately practiced offend the law? What part of Boulwarism survived its judicial interment? Before entering into a discussion of its legal standing, it would be useful to anatomize in detail the Boulware method of collective bargaining, its genesis, and underlying purpose.

### *The Future Use of Boulwarism Forecast*

The marketing of Boulwarism to American industry<sup>13</sup> and the denigrating, if not apocalyptic, characterization by Boulware's spokesman of the Board's remedial order as "inconsequential and perfunctory,"<sup>14</sup> forecast the continued use of Boulwarism by GE. The Board issued its Decision and Order on December 16, 1964. Undaunted by the Board's order, however, GE continued its special brand of "bargaining" into the 1969 negotiations. According to a charge filed by the IUE, GE applied Boulwarism with more vigor and in a more egregious fashion during the 1969 negotiations

---

7. *Id.* at 756-63.

8. 150 N.L.R.B. at 194.

9. 418 F.2d 756.

10. "This plan [Boulwarism] had two major facets: first, a take-it-or-leave-it approach ("fair, firm offer") to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interests, further denigrating the Union, and sharply curbing the Company's ability to change its own position." *Id.*

11. 150 N.L.R.B. at 193.

12. It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). National Labor Relations Act, *as amended*, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

13. L. BOULWARE, *THE TRUTH ABOUT BOULWARISM*, 158 (1969); H. NORTHRUP, *BOULWARISM, THE LABOR RELATIONS POLICIES OF THE GENERAL ELECTRIC COMPANY, THEIR IMPLICATIONS FOR PUBLIC POLICY AND MANAGEMENT ACTION*, preface and p. 159 (1964). Professor Northrup was a member of GE's employee relations staff during the administration of Boulwarism.

14. H. NORTHRUP, *supra* note 13, at 105.

than it did in 1960.<sup>15</sup> The IUE charged that not even the decision handed down on October 28, 1969, by the Court of Appeals for the Second Circuit, enforcing the Board's order, altered the Boulwaristic "bargaining" course that GE had chosen to follow since 1948.<sup>16</sup>

To resolve any doubts about its continued adherence to the Boulware method, the Company, on June 16, 1969, just prior to the start of negotiations, issued a special supplement to its regular internal management newsletter, *Relations Reviews*, in which it reaffirmed Boulwarism and its *modus operandi*. The supplement was released at the same time to the Bureau of National Affairs for publication.<sup>17</sup> Thus, in view of the continued existence contemplated for Boulwarism, an examination of its anatomy would be more useful than a postmortem of the corpus that was thought to have been laid to rest by its judicial interment.

### *Genesis and Creator*

As a result of a national strike against GE in 1946, Lemuel R. Boulware was selected by GE President Charles E. Wilson to decide on a new approach to labor relations and collective bargaining. Following the birth of the bargaining technique that bears his name, he was elevated to Vice-President of Employee and Plant Community Relations.<sup>18</sup> Boulware saw the strike of 1946 as the result of GE's failure to apply its merchandising principles to its management of labor relations and resolved "to do whatever was necessary to achieve ultimately the same success in job marketing that we [GE] accomplished in product marketing."<sup>19</sup> He saw his task as the need to eliminate the "obsolete vestiges of paternalism," to exclude from the bargaining process "eastern bazaar bargaining" and "facing up to the regrettable and distasteful but vitally necessary task" of correcting any "unwarranted confidence in any unsound proposals by union officials."

The new approach mandated that "doing right voluntarily" was not enough. It was necessary as well to have it known that GE "did right voluntarily."<sup>20</sup> This declaration became Boulware's fiat for the single most important element of his bargaining formula—the communication system

---

15. BNA, DLR Nov. 5, 1969, pp. A 1-2. See charges filed by IUE, Case No. 2-CA-11911.

16. GE had filed its petition for a Writ of Certiorari. The Board would not initiate contempt proceedings while the petition was pending before the Supreme Court.

17. The entire supplement is published under the title, *The History and Development of Our Employee Relations Philosophy and Union Bargaining Approach: How It Evolved over the Years & Works Today* in 1969 LABOR RELATIONS YEARBOOK 68 (1970).

18. H. NORTHRUP, *supra* note 13 at 26, 27.

19. *Id.* at 28.

20. *Id.* at 27.

by which his product, the "fair, firm" offer was sold, through what the court described as "a veritable avalanche of publicity, reaching awesome proportions prior to and during negotiations."<sup>21</sup>

Although on its face Boulwarism appears to be just a bargaining technique, the results that follow in its wake involve vital social and political as well as economic considerations that extend far beyond the bargaining method. The author of Boulwarism appears to have been fully aware of these considerations. A fair reading of Mr. Boulware's own justification of his technique clearly establishes the extent to which his social and political convictions influenced his authorship of the bargaining method.<sup>22</sup> Boulware's predilections about unions reflect the antediluvian concept that they were agents of Socialism, fully committed to undermining private ownership; that many of the union organizers were dyed in the wool Socialist Revolutionaries who utilized "the basic socialist party line in order [to] discredit . . . private business in both the material and the non-material areas."<sup>23</sup>

Boulware's political and philosophical bias against unions and their leadership wove its way into the job merchandising program of GE,<sup>24</sup> and was the subject of a number of findings by the Trial Examiner.<sup>25</sup> The Trial Examiner found *inter alia* that GE manifested "a deliberate design to undermine employee faith and confidence in the Union's leadership and in the efficacy of the collective bargaining process;"<sup>26</sup> that GE pursued "The tactic of attacking the motives of the IUE leadership [which] had been decided upon as a communications approach long in advance of the negotiations."<sup>27</sup> The company's employee communication system stressed the "selfish," "irresponsible" leadership and their "political motives."<sup>28</sup>

Boulware looked upon the union shop as another form of monopoly which invites "possible control by racketeers and protected demagogues."<sup>29</sup> He both lamented and attacked the provision of the National Labor Relations Act that grants unions the right to act as the "sole bargaining" representative of the employees on the ground that it vests in unions a

---

21. 418 F.2d at 740.

22. L. BOULWARE, THE TRUTH ABOUT BOULWARISM, chs. 15 THE AFTERMATH, 99-102, 17, POLITICAL BARGAINING 106-16, 20, WHOSE JOB 158-67 (1969).

23. *Id.* at 100.

24. In a full page advertisement at Pinellas Park, Florida, GE appealed to its employees to oppose IUE stating that "the union organizing campaign is part of an effort to gain economic and eventual strength in Pinellas County and the entire state." General Counsel's Exhibit 90, at 20, Col. 2-4, Case No. 2-CA-7581.

25. See note 4, *supra*.

26. 150 N.L.R.B. at 277.

27. *Id.* at 276.

28. *Id.* at 277.

29. L. BOULWARE, *supra* note 13, at 129.

"tight monopoly" and is the basic source of a union official's vast economic power.<sup>30</sup>

Boulware's anti-union bias had its impact on the substance of contract settlements with unions and cut into normally accepted contract areas. The union shop or any other form of union security is declared by GE to be out of bounds on the asserted ground that it offends the company's "principles" which eschew compulsion in any form and violates the individual freedoms of its employees. Except for disciplinary cases and other limited areas, GE resists arbitration of grievances arising under the administration of a contract including rates of pay.<sup>31</sup> GE insists on reserving to itself the right to modify wages up or down during the administration of the contract, justifying this policy by giving the union the right to strike following the exhaustion of grievance procedures.<sup>32</sup>

GE's contracts with all unions for the most part substitute the right to strike for arbitration as a method of settling grievances. It will adhere rigidly to its pro-strike versus arbitration policy despite serious production losses which according to the company run at the staggering annual rate of 6,000,000 man hours.<sup>33</sup> In 1966, GE made the claim that a large number of the grievance strikes in that year were attributable to the union's attempt "to build up an argument in favor of broader arbitrability of grievances."<sup>34</sup> The general impact of the anti-union bias inherent in Boulwarism is reflected also by the number of unfair labor practices of which GE has been found guilty. They include violations of almost every section of the law.<sup>35</sup>

---

30. *Id.* at 111. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1964) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Boulware erroneously refers to it as the "sole bargaining" provision of the statute.

31. The GE-IUE contract contains 17 limitations on the right to arbitrate and removes *inter alia* from arbitration, disputes over job classifications, rates of pay, and incentive standards (Art. XV). See also H. NORTHRUP, *supra* note 13, at 185-91.

32. GE's insistence on reserving and exercising this right is the basis of a union charge of violation of Section 8(a)(5) bottomed by the claim that such broad reservation of rights consists of unilateral control of wages—the most important ingredient in a labor contract. See *NLRB v. General Elec. Co.*, 418 F.2d 736, 739, 746.

33. *General Electric News*, at 6.

34. *Id.*

35. The following is a list of some of the cases decided during the period 1965-69: The Boulware case, 150 N.L.R.B. 192 (1964) *enforced* 418 F.2d 736 (2d Cir. 1969) *cert. denied* 90 S. Ct. 995 *petition for rehearing denied* — S. Ct. — (1970); Refusal to bargain, 173 N.L.R.B. 22 *enforced* 414 F.2d 918 (4th Cir. 1969), *cert. denied* 90 S. Ct. 557 (1970); 177 L.R.R.M. 2418 (1969); 176 N.L.R.B. 84 (1969); 162

### *GE's Structure*

The General Electric Company is the largest manufacturer of electrical products.<sup>36</sup> It employs 290,000 persons in the United States<sup>37</sup> and 400,000 worldwide.<sup>38</sup> It is the most diversified industrial complex in this country, manufacturing products in 128 different lines including almost every basic industry.<sup>39</sup> The company carries on vast foreign operations in 102 plants in 25 countries on every continent of the world except Antarctica.<sup>40</sup> It does business with more than 100 international and local unions of which the International Union of Electrical, Radio and Machine Workers (IUE) is the representative of the largest single group under one national contract.<sup>41</sup>

### *How the Offer is Prepared*

GE's *modus operandi*, before making an offer, is to seek through research all pertinent facts to permit it to determine what is "right" for its employees. Its research includes a study of business conditions, competitive factors and economic trends. It includes a determination of its employees' needs and desires through independent employee attitude surveys, comments made by employees at informative meetings, direct discussions by supervisors with employees and statements in union publications. When bargaining begins, the company as part of its overall research, listens to the presentation made by the union and evaluates the union's demands with the help of all the facts it has on hand, including those supplied by the union.<sup>42</sup>

On the basis of its study so made, GE makes its own determination of what is "right." It then makes an offer which—as it declares to all unions

---

N.L.R.B. 912 *enforced* 383 F.2d 152 (4th Cir. 1967); refusal to recognize coordinated bargaining committee, 173 N.L.R.B. 46 (1968) *enforced* 412 F.2d 512 (2d Cir. 1969); denial of union right to make collections and support grape pickers' strike, 169 N.L.R.B. 155 (1968); refusal to bargain by maintaining inflexible position on wages, refusing to negotiate during strike and to supply bargaining information, company surveillance of union activities, threats and interrogation because of union activity, granting wage increase to defeat union and the destruction of a union by resort to unfair labor practices, 163 N.L.R.B. 30 (1967) *enforced* 400 F.2d 713 (5th Cir. 1968); discipline because of union activity, 149 N.L.R.B. 1541 (1964) *enforced sub nom* NLRB v. Caribe GE, 357 F.2d 664 (1st Cir., 1966); retaliatory discipline because of employees' testimony before NLRB, 155 N.L.R.B. 1365 (1965); unlawful surveillance and interrogation, 150 N.L.R.B. 829 (1965).

36. 418 F.2d at 740.

37. General Elec. Co. v. NLRB, 412 F.2d 512, 514 (1969).

38. 1968 GE ANNUAL REPORT TO STOCKHOLDERS 26.

39. FORTUNE, *Plant and Products Directory of the 500 Largest Industrial Corporations* (1966).

40. INTERNATIONAL METAL WORKERS FEDERATION, *PROFILE OF GENERAL ELECTRIC Co.* (March 1969).

41. 150 N.L.R.B. at 205.

42. *Id.* at 208.



and to its employees—includes everything it finds to be warranted with nothing held back for trading or compromising. As explicated by GE recently, the offer will be modified only “in the light of new, or overlooked, facts”<sup>43</sup> which do not include “strike threats, rejection by union officials, and [Government] intervention.”<sup>44</sup> Compromise during bargaining, ridiculed as “concessionneering,” has no place in GE’s bargaining lexicon.<sup>45</sup>

### *The Making of the Offer*

Before actually making the offer, GE will request a meeting of IUE officials where it will unveil the offer to be given the next day to all of the 100 unions it deals with.<sup>46</sup> It will accordingly make the offer to IUE and at or about the same time issue substantially identical offers to all of the other unions and the press. It will reject the union’s request for an opportunity to study the offer and to give GE its comments before the company distributes it to the public.<sup>47</sup>

The company thereupon dispels any doubts about the finality of the “fair, firm” offer by putting it into effect for non-represented employees, communicating at the same time the message that any delay by union leaders in accepting the offer is a costly union neglect for the reason that there will be no retroactivity when the union finally sees the light.<sup>48</sup> In the period that follows, each of the 100 separate and disjointed unions will be whipsawed against the other until the substantially identical offer is accepted.<sup>49</sup>

---

43. 71 LAB. REL. 194, 1969 LABOR RELATIONS YEARBOOK 74 (1970).

44. *Id.* at 195.

45. *Id.* at 194. Judge Kaufman gave the following description of GE’s slavish adherence to its no compromise policy: The Company, having created a view of the bargaining process that admitted of no compromise, was trapped by its own creation. It could no longer seek peace without total victory, for it had by its own words and actions branded any compromise a defeat. 418 F.2d at 760.

46. *See, e.g.*, 150 N.L.R.B. at 225.

47. *Id.* at 227. On August 29, 1960, and even prior to the offer preview meeting that night, GE assembled all of its plant managers. Each of them was given a package containing a script of a tape recording discussing the proposal, slides to be used in explaining it to the employees, a form letter to be used in making the offer to other unions, a series of questions and answers about the proposals; a GE News Special Edition describing the 1960 program in detail; a model newspaper ad designed to extol the virtues of the proposal to each community and a document entitled *Communication Program Information*, which adverted to other bulletins to be distributed to employees, highlighting features of the offer, letters to employees’ homes, press releases and radio and television messages. *Id.*

48. H. NORTHROP, *supra* note 13, at 54, 55. *See also* General Elec. v. NLRB, 412 F.2d 512, 518-19 (2d Cir. 1969).

49. *See* General Elec. Co. v. NLRB, 412 F.2d 512, 514 (1969); McLeod v. General Elec. Co., 257 F. Supp. 690, 694 (S.D.N.Y. 1966).

### *The Communication System*

To insure its acceptance, GE at the time the offer is made, launches a massive and overwhelming communication campaign intended to reach not only the community but the home of each employee as well. The linchpin of the Boulware approach is to bring GE's side of the story home to its employees and to the general public. The overwhelming character of the communication program upon which GE relies to the "virtual exclusion of genuine negotiations," was described by the court as ". . . a veritable avalanche of publicity, reaching awesome proportions prior to and during negotiations. . . . [A] vast network of plant newspapers, bulletins, letters, television and radio announcements, and personal contacts through management personnel."<sup>50</sup>

GE assures its supervisors that if its offer is "fair" and the homework has been done right, the employees can not only be expected to support it, but will pressure their union officials, who, if they are responsible—"will seek feedback and act on it."<sup>51</sup> The intended end product of this vast and awesome campaign is to insure GE's freedom from strikes upon contract termination which GE cynically suggests "should be of major value to union officials." GE concludes its brochure on Boulwarism with the triumphant note that it succeeded in having no company-wide strike since 1946, except for the "abortive" strike of 1960.<sup>52</sup>

In its communications, GE points up the "theoretical" character of the collective bargaining it exercises. In a prepared question and answer brochure, Boulware as GE's Vice President, posits the bizarre version of bargaining in which the union is accorded a theoretical standing and under which it is the employees who act as their own bargaining agent:

Theoretically, the union officials are bargaining with management. Practically, however, it is the employees who are bargaining with customers—bargaining as to what customers are able and willing to pay for the work General Electric employees do as compared with the price at which they can buy the results of competing employees' work elsewhere in this country or abroad.<sup>53</sup>

The court found that the aim of Boulwarism is "to deal with the Union

50. 418 F.2d at 740, 741. A typical employee at some of the larger plants received over 100 written communications during September and October. On many days he received up to four GE messages, not including oral discussions and meetings with supervisors. *Id.* at n.14.

51. *GE Relations Reviews*, 71 LAB. REL. REP. at 195, 1969 LABOR RELATIONS YEARBOOK 75 (1970).

52. *Id.*

53. *GE's Communicators Exchange*, April 29, 1960, General Counsel's Exhibit 109-13, at 2, Case No. 2-CA-7519, reported in 150 N.L.R.B. 192.

through the employees, rather than with the employees through the Union.”<sup>54</sup>

*Boulwarism Denies a Union the Statutory Right to be a Participant  
in Fixing Terms of Employment*

The vice in Boulwarism is that the union is accorded only the role of a source of additional information and is excluded from any meaningful participation in the determination of the terms to be included in the contract which the union is being asked to sign. It conceives meetings with the union merely as “listening” sessions, forming but one phase of the “research” upon which GE “makes its unilateral determination” of what is “right” for incorporation into its “fair, firm” offer.<sup>55</sup> Collective “bargaining” as practiced under Boulwarism is thus a mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an advisor.<sup>56</sup> The Boulware doctrine and its approach to bargaining, no matter how fair its “fair, firm” offer or how impartial its method in arriving at it, produce inevitably total unilateral control by the employer of its distributive power.<sup>57</sup> The “bargaining” process under these conditions becomes all form without substance—not only “moot, but morte.”

One of the intended by-products of Boulwarism and GE’s benchmark of its successful application, is the prevention of company-wide strikes, as distinguished from local grievance strikes.<sup>58</sup> The denial of the statutory and constitutional right to strike can take many forms. The use of thugs and spies uncovered by the hearings that gave rise to the statutory protection of this basic right, while outdated, can take on more subtle forms and ingenious devices. The stated aim of Boulwarism to prevent strikes applied also, it would appear, to breaking them when they started. The IUE engaged in a three-week strike aborted by the successful efforts of the company to break it. The Trial Examiner found that: “Apart from being in derogation of the Union’s agency status, the Respondent’s conduct . . . constituted . . . unlawful solicitations to induce employee abandonment of the strike.”<sup>59</sup> It did so through the medium of holding out special benefits of more favorable settlement conditions to part of the bargaining unit; through a communication program to discredit the motives of the union’s leader-

---

54. 418 F.2d at 759.

55. 150 N.L.R.B. at 270.

56. *Id.* at 195-96.

57. See Duvin, *The Duty to Bargain: Law In Search of Policy*, 64 COLUM. L. REV. 248, 291 (1964).

58. 71 LAB. REL. REP. at 195, 1969 LABOR RELATIONS YEARBOOK 75 (1970).

59. 150 N.L.R.B. at 266.

ship inducing and encouraging nonsupport of the union's bargaining and strike decisions; and through attempts to negotiate separately with locals and solicit their abandonment of the strike.<sup>60</sup>

The findings by the Trial Examiner of strike breaking, isolated from all the other facets of Boulwarism, may not perhaps generate serious concern for the fate of free trade unionism. When strike breaking, however, is considered as one part of an overall management scheme to negate effective bargaining participation and so to undermine a union as to emasculate its ability to exercise any countervailing power, such an overall scheme, if accorded legal acceptance, would eat away at the vitals of a free democratic society.

A program designed to sap the employees' will to strike as a part of the bargaining approach is at odds with the statutory precepts of free collective bargaining. The Supreme Court in *International Insurance Agents*,<sup>61</sup> stressed the right of labor to possess and use its countervailing economic power as part of the collective bargaining process: "[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."<sup>62</sup> Balanced economic pressure is "a prime motive for agreement in free collective bargaining."<sup>63</sup> It is an integral part of the democratic capitalistic system in which we function. The characteristic thing about a free democratic society is its diffusion of power among the people and it is no historic accident that in the totalitarian states of both the left and right, trade unions are servile and weak institutions that exist at the will and under the domination of the employer and the state.<sup>64</sup>

The National Labor Relations Act, in *haec verba* declares its purpose to be the restoration of the equality of bargaining power between employers and employees.<sup>65</sup> The Supreme Court very early held the equality of

---

60. *Id.*

61. *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. 477, 495 (1960).

62. *Id.* at 495.

63. G. TAYLOR, *GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS* 18 (1959), quoted with approval in *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. 477, 489 (1960).

64. See BRADY, *BUSINESS AS A SYSTEM OF POWER*, Chs. VIII, IX (1943).

65. Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power. . . .

National Labor Relations Act, Findings and Declaration of Policy, Section 1.

bargaining power between "capital and labor" to be the aim of the Act.<sup>66</sup> According to Archibald Cox, "The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards."<sup>67</sup>

Collective bargaining has been said to be the extension of the basic principles of democracy into industry through unions, and an instrument through which workers seek to replace the "system of corporate industrial dictatorship" with one involving equal and democratic participation in the redistribution of the proceeds of collective bargaining.<sup>68</sup> The legislative history behind the National Labor Relations Act strongly suggests that the free exercise of employees' rights under the proposed Act was to be the basis for the industrial and political democracy intended by the Act.<sup>69</sup> A bargaining technique which has for its intended results the divestiture of real, as distinguished from illusory, union participation in establishing terms and conditions of employment, and the paralysis of its economic power, is hostile to the stated purpose and principles of the National Labor Relations Act.

The most cogent indictment, both moral and legal, of Boulware's refusal to permit effective union participation in bargaining was stated by the prestigious Professor Selekman:

. . . if the aim is to "cut a union down to size," to beat union leadership to the punch, then indeed the strategy is tantamount to a Machiavellian use of power to discredit and, if possible, to destroy the union. It denies workers adequate and competent representation, for such tactics will never afford leaders an opportunity for development and growth. Indeed, the most serious moral defect of Boulwareism lies precisely in the fact that it deprives a human institution of the opportunity to grow in maturity and responsibility. . . . The best way for union members and leaders to acquire knowledge of the complex economic, political, and social factors at work is to learn through the negotiation and administration of agreements. But Boulwareism affords them little or no opportunity to undergo such an experience. It presents them with a "take it or leave it" ultimatum.<sup>70</sup>

---

66. *American Steel Foundries v. Tri City Central Trades Council*, 257 U.S. 184, 209 (1921). See also *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. 477, 507 (1960) (Frankfurter, J.).

67. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV., 1401, 1407 (1958).

68. See C. GOLDEN & H. RUTTENBERG, *THE DYNAMICS OF INDUSTRIAL DEMOCRACY*, XXIV, 22 (1942).

69. S. REP. NO. 1184, 73 Cong. 2d Sess. (1934).

70. Selekman, *Cynicism and Managerial Morality*, 36 HARV. BUS. REV. 61, 64-65 (1958). See also Blum, *Collective Bargaining: Ritual or Reality*, 39 HARV. BUS. REV. 63, 66 (1961).

Boulwarism's crucial blow, according to Professor James J. Healy, is that its labor relations is strictly unilateral and "by its nature it flouts the union's responsibility for the employees."<sup>71</sup> Even before the enactment of the Act, Mr. Justice Brandeis, in testimony before the U.S. Commission on Industrial Relations,<sup>72</sup> spoke out for joint participation by unions and management in negotiating employment conditions.

The vice of unilateral control and the denial of joint participation by the union and the employer was pointed up in the dissenting opinion of Judge Lumbard in *NLRB v. Katz*, which became the position of the Supreme Court: "the failure to notify the union if there has been an opportunity to do so must in all but the most extreme circumstances signify an intent to deny the employees any role in decision-making with respect to the particular condition of employment which is involved."<sup>73</sup> Congress expressed the same concern in protecting the right of an employer to be a joint participant in the decision making processes of collective bargaining in the enactment of Section 8(b)(3).<sup>74</sup> Decisional law and the literature on the subject matter lends convincing support to the need for effective participation in the decisional processes of establishing conditions of employment if the statutory standard of good faith bargaining is to be met.

### *Test of Good Faith Bargaining*

#### *Prefatory Statement*

Before discussing the statutes applicable to good faith bargaining requirements and the cases decided thereunder, a few preliminary observations may be appropriate concerning some of the legal issues raised by Boulwarism.

Although the term Boulwarism has been extensively used as part of the jargon by writers on the subject matter, it was given its judicial christening in the Second Circuit's decision. "Boulwarism," said Judge Kaufman, "became the hallmark of the company's entire *attitude* toward its employees."<sup>75</sup> (Emphasis added.) Boulware's own "*Truth About Boulwar-*

71. J. HEALY, CREATIVE COLLECTIVE BARGAINING 56-59 (1965). See also Duvin, *The Duty to Bargain: Law In Search of Policy*, 64 COLUM. L. REV. 248, 291 (1964).

72. S. Doc. No. 415, 64th Cong. 1st Sess. 7659-60 (1916), quoted in Bakke, Kerr & Anrod, UNIONS, MANAGEMENT, AND THE PUBLIC 233 (2d ed. 1960).

73. 289 F.2d 700, 712 (2d Cir. 1961).

74. Senator Ellender, 93 Cong. Rec. 4135, 4581, 2 Leg. Hist. LMRA 1947, 1062, 1244; Senator Knowland, 93 Cong. Rec. 4365, 2 Leg. Hist. LMRA 1947, 1172; Senator Morse, 93 Cong. Rec. 1844, 2 Leg. Hist. LMRA 1947, p. 982; Senator Taft, 93 Cong. Rec. 3858, 2 Leg. Hist. LMRA 1012 (1947).

75. 418 F.2d at 740.

ism”<sup>76</sup> lends convincing support to Judge Kaufman’s explication of the term as positing an “attitude,” approach or general philosophy of industrial labor relations in its broadest terms.

Boulwarism’s claim to distinction lies not only in its broad sweep but in the novelty of its approach. It is truly *sui generis*. A determination of the legal standing of the bargaining formula in question must include something more than examination of precedents as applied to an unprecedented bargaining tactic. In such an examination the rule of *stare decisis* must give way to the rule of reason and the underlying purpose of the applicable law.<sup>77</sup> Judge Friendly’s dissent, for example, is bottomed on his acceptance of the outworn “willingness to agree” standard while at the same time he objects to the “totality of conduct” test relied on by the Board and the Court.<sup>78</sup> Board member Jenkins would hold that it is not bad faith to embark on a “take-it-or-leave-it” position or to enter into negotiations with a fixed position from which it is proposed through “hard bargaining” not to retreat.<sup>79</sup> The writer suggests that these needlepoint distinctions obfuscate the real thrust of the issue. The arguments advanced by the dissenters are based on the erroneous hypothesis that the employer in the case then under consideration formulated a bargaining position after due consideration was given to a specific bargaining demand by a specific union.

The issue to be met is that posed by a bargaining technique structured, not to meet the bargaining issues at any one bargaining table with any one union, but a bargaining formula to be applied with equal and inexorable force to every bargaining table with any union, large or small, concerning any dispute and without any consideration of the bargaining issues particularized by an equal bargaining participant. Boulwarism as conceptualized and practiced is a bargaining patent medicine prescribed beforehand for every bargaining ill. The diagnosis never varies and the prognosis is always predictable.

Board Member Jenkins attacks the majority decision on the ground that “the opinion . . . fails to distinguish between two important concepts; viz, the formulation of a settlement position and the techniques employed in reaching a settlement.”<sup>80</sup> The distinguished Board Member, however, fell

---

76. L. BOULWARE, *THE TRUTH ABOUT BOULWARISM: TRYING TO DO RIGHT VOLUNTARILY* (1969).

77. See *Burnett v. Coronado Oil & Gas Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting); See also *Holden v. Hardy*, 169 U.S. 366, 387 (1898); *DiSanta v. Pennsylvania*, 273 U.S. 34, 41 (1927) (dissenting opinion); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924).

78. 418 F.2d at 767.

79. 150 N.L.R.B. at 199.

80. 150 N.L.R.B. at 199.

into the very error charged to the majority. It is the Boulware technique that fails to make the asserted distinction. Each of its concepts, the offer and the settlement is inseparable. They are preordained. They merge into one single preconceived program with predetermined results. They flow from the same fountain head.

A condition precedent to the application of any good faith bargaining standard; indeed, a threshold standard, is the acceptance by the employer of the union. Acceptance must mean something more than the formal statutory recognition of the union as a bargaining agent. The formally recognized but unaccepted union is made to feel like a trespasser at the bargaining table and the bargaining that follows is form without substance. It is GE's refusal to accept the union as an equal at the bargaining table that explains its refusal to engage in good faith bargaining. All of the proscribed conduct flows from this fundamental position. The techniques employed (the fair, firm offer and the communication system) to frustrate the bargaining process are merely the syndromes by which the unlawful conduct is identified.

The "acceptance of the union" standard is a subjective one and its application involves the probing of the employer's mind. But every other subjective good faith test involves the same process of determining the intent of a person. In determining the employer's intent to accept the union, the courts will give recognition to the expertise of the Labor Board in dealing with a specialized field of knowledge, for which courts will not substitute their judgment.<sup>81</sup> The application of this standard, like any other good faith bargaining test, requires the canvassing of the entire record to determine the total orientation of the employer's conduct.<sup>82</sup>

### *Statutory Tests*

There are three controlling sections that deal with an employer's duty to bargain: Sections 7, 8(a)(5) and 8(d).<sup>83</sup> Section 7 guarantees to em-

---

81. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

82. *NLRB v. Reed and Prince Mfg. Co.*, 205 F.2d 131, 134, 139 (1st Cir. 1963); see also 76 HARV. L. REV. 807, 811 (1963).

83. Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section



employees the right to self organization and to bargain collectively through representatives of their own choosing. In measuring an employer's duty under Section 7 to deal with a union freely chosen by his employees, the element of good faith is not a consideration. Section 7 contains the congressional guarantee that employees may freely and without employer influence bargain through representatives of their own choosing. Good faith, therefore, is no defense to a charge based on the refusal or the failure of an employer to recognize the union chosen by the employees. The selection of the employees' bargaining representative, for example, is outside of the proper limits of an employer's interest or inquiry.<sup>84</sup>

We are concerned here, however, not with the employer who refuses to recognize or meet with the representatives of the union, but with the standard of conduct required when he meets for the ostensible purpose of bargaining for terms and conditions of employment. Section 8(a)(5), which makes it an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees, must be read together with Section 8(d) in fixing and measuring his obligation to bargain with respect to wages, hours, and other conditions of employment.

Those who support or lean heavily toward the contention that Congress did not intend any interference with the conduct of union and management negotiators (so long as they meet and discuss each other's demands) hark back to the often quoted remarks of Senator Walsh, then Chairman of the Senate Committee on Labor and Education. In substance, he stated that all the law proposes to do is to escort the union representatives to the door of the employer and what happens behind those doors will not be inquired into.<sup>85</sup> This unrealistic concept of bargaining would permit any behavior by

---

[8(a)(3)]. . . .

National Labor Relations Act § 7, *as amended*, 29 U.S.C. § 157 (1964). Section 8(d) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

National Labor Relations Act § 8(d), *as amended*, 29 U.S.C. § 158(d) (1964).

84. *Prudential Ins. Co. v. NLRB*, 278 F.2d 181 (3d Cir. 1960); *American Laundry Mach. Co. v. NLRB*, 174 F.2d 124, (6th Cir. 1949); *NLRB v. Sunbeam Elec. Mfg. Co.*, 133 F.2d 856 (7th Cir. 1943). *See also NLRB v. Katz*, 369 U.S. 736, 743 (1962) for the holding that there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—to meet and confer on any mandatory bargaining subject.

85. 79 CONG. REC. 7660 (1935) (remarks of Senator Walsh).

the parties at the bargaining table. It would insulate from regulation all conduct of an employer (or of a union under Section 8(b)(3) ) and permit unscrupulous employers to subvert the law by stalling tactics and talking the union to death.<sup>86</sup> The Supreme Court disapproved Senator Walsh's doorstep limitation on the regulation of bargaining conduct,<sup>87</sup> subject, however, to the caveat that the parties must be unrestricted by any governmental power to regulate substantive provisions of their settlement or the solution of their differences.<sup>88</sup> A balance must therefore be struck between Government regulation of bargaining and interference in determining substantive terms.<sup>89</sup>

Good faith or the lack of it is a question of fact as to a state of mind and is for the Labor Board to determine, subject to review only for substantial evidence.<sup>90</sup> A determination of good faith or the want of it may rest only on an inference based on more or less persuasive manifestations of another's state of mind. Considering the complexities in determining one's state of mind, it would appear necessary to accord to the Board a wide latitude in its inquiry into the facts. Good faith—or the lack of it—must in the absence of a per se violation depend on a factual determination based on the overall conduct of the party charged.<sup>91</sup> Relevant facts would include the relations of the parties, antecedent events explaining behavior at the bargaining table, as well as during the period of negotiations.<sup>92</sup>

There have been many criteria or tests advanced for finding the presence of good or bad faith in collective bargaining. Reliance on any one of them without due regard to the totality of the parties' conduct is often an irresistible but hazardous temptation for the advocate. With this caveat in mind, an examination of the tests laid down by the courts may be of value in determining whether Boulwarism or any of the many parts that make up its unique method of bargaining will survive one or more of such tests.

The Supreme Court in *Truitt Mfg. Co.*, laid down the rule which would outlaw the predetermined "fair, firm" or "take-it-or-leave-it" offer that is the hallmark of Boulwarism. Decisional law under Sections 8(a)(5) and

---

86. See 76 HARV. L. REV. 807, 810 (1963).

87. NLRB v. Insurance Agents Int'l. Union, 361 U.S. 477, 485 (1960).

88. *Id.* at 488. See also H.K. Porter, 90 S. Ct. 821 (1970).

89. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

90. Local 833 UAW v. NLRB, 300 F.2d 699, 706 (D.C. Cir. 1962), United Steel Workers of America v. NLRB, 405 F.2d 1373 (D.C. Cir. 1968).

91. NLRB v. Insurance Agents Int'l. Union, 361 U.S. at 505, 508; NLRB v. Reed & Prince Mfg. Co., 205 F.2d at 139.

92. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956); cf. NLRB v. Reed & Prince Mfg. Co., 205 F.2d at 139, 140.

8(b)(3), which places a corresponding duty on the union *vis a vis* the employer, spell out the following basic good faith obligation of the parties: They must make an honest effort to come to terms; they are required to reach an agreement in good faith; and they must do more than merely go through the motions of negotiating. The foregoing good faith requirements are patently inconsistent with a predetermined resolve not to budge from an initial position.<sup>93</sup> Mr. Justice Frankfurter was quick to add to his enunciation of the foregoing standards, that they are not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness, a reminder no doubt prompted by his holding that both Sections 8(a)(5) and 8(d) must be read together and that the latter section is a limitation on the Board's power to find a violation of the former.<sup>94</sup>

Although the employer is not required under Section 8(d) of the Act to make concessions, he must observe the following additional good faith requirements: Avoid behavior which obstructs or inhibits the actual process of discussion or reflects a cast of mind against arriving at an understanding;<sup>95</sup> discuss freely the respective contentions of the parties and attempt in good faith to justify his position;<sup>96</sup> approach the bargaining table with an open mind and fairly consider opposing arguments and possible solutions;<sup>97</sup> honestly attempt to overcome obstacles;<sup>98</sup> demonstrate a spirit of cooperation;<sup>99</sup> keep an open and fair mind;<sup>100</sup> "collective bargaining is not simply an occasion for purely formal meetings between management and labor while each maintains an attitude of 'take-it-or-leave-it;' it presupposes a desire to reach ultimate agreement to enter into a collective bargaining contract."<sup>101</sup> It is bad faith for a party to approach the bargaining table with the desire not to reach an agreement, although conversely the desire to reach an agreement considered by itself is not controlling as to his good faith.<sup>102</sup> A refusal to make a counter proposal when asked to do so by the union may be considered in finding bad faith,<sup>103</sup> but it is not necessarily

---

93. *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 154.

94. *Id.* at 155.

95. *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

96. *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3rd Cir. 1941).

97. *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941); *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

98. *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 215-16 (8th Cir. 1965).

99. *NLRB v. Atlantic Broadcasting Co.*, *sub nom.* *NLRB v. Woodruff*, 193 F.2d 641, 642 (5th Cir. 1952).

100. *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

101. 361 U.S. at 485.

102. 205 F.2d at 134.

103. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943); *NLRB v. George P. Pilling*, 119 F.2d 32 (3d Cir. 1961); *see Cox and Marcus n.105, infra.*

a per se refusal to bargain.<sup>104</sup>

While recognition by the employer of the union as the exclusive bargaining agent may satisfy the formalistic requirements of Section 7, something more is mandated to satisfy the good faith bargaining requirement of Section 8(a)(5). The latter requires in addition to recognition, the acceptance of the union as a joint and real participant in determining the conditions of employment. A "take-it-or-leave-it" offer would not appear to be a refusal to bargain in every circumstance. Intransigence by itself is not a refusal to bargain and absent any other indicia of bad faith is protected by Section 8(d) of the Act.<sup>105</sup> A valid distinction may be drawn, however, between stubbornness or what may appear to be unreasonableness and the Boulware predetermined resolve not to budge from an initial position, the latter being inconsistent with good faith bargaining.

*"Willingness to Agree" Standard.*

In the Boulware case the employer stoutly contended that the "fair, firm" or "take-it-or-leave-it" method of dealing with a union could not violate the law so long as the employer carries on its discussions with a desire to reach an agreement. The test of good faith, GE argued, was its admitted willingness to reach and sign an ultimate agreement.

Judge Friendly relied on *Reed & Prince* as the lead case in support of the "unwillingness to agree" standard.<sup>106</sup> In that case the court found that "the desire not to reach an agreement with the union" constitutes bad faith. The error in the reasoning of the dissenting judge is his patent *non sequitur*, viz: that if as a matter of law it is bad faith for an employer to enter negotiations with his mind fixed against reaching an agreement, conversely a finding of good faith must follow if the employer enters negotiations with his mind fixed on getting an agreement. A desire not to enter into an agreement is a per se violation of the Act while a desire to enter into an agreement is but one element in a totality of circumstances, all of which must be considered in determining the question of good or bad faith.<sup>107</sup>

---

104. NLRB v. Adler Metal Products, 79 N.L.R.B. 219 (1948).

105. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956). See also Local 2647, Lumber & Sawmill Workers, 130 N.L.R.B. 235, 239 (1961), *enforced, sub nom.* Cheney California Lumber Co. v. NLRB, 319 F.2d 375 (9th Cir. 1963). The take-it-or-leave-it ultimatum in this case was presented after five months of bargaining and following an impasse, *Id.* at 380. Section 8(d), however, did not overrule the doctrine that proof of a refusal to make a counter offer is admissible as evidence of bad faith. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1421 (1958). See also Marcus, *The Employers Duty to Bargain: Counterproposal v. Concession*, 17 LAB. L.J. 541, 542 (1966).

106. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

107. See NLRB v. Insurance Agents Int'l, 361 U.S. at 504.

The "willingness to agree" standard can be a legalistic but empty formalism if applied indiscriminately and without regard to all of the surrounding facts and behavior of the parties.<sup>108</sup> A desire to reach an agreement may mean different things to different people but in the context of a meaningful and purposeful reading of Section 8(a)(5), it must mean more than a willingness to sign a piece of paper.<sup>109</sup>

An ultimate agreement or the terms that go into it may not validate the tactics employed to exact them. It is not the terms of a settlement that determine whether the regulations governing bargaining have been complied with. A signed contract, or an offer to do so, may not immunize conduct which otherwise would violate the Act. It is the conduct of the parties before and during negotiations that will determine whether the requirements of the law have been met. Similarly, the content of a collective bargaining agreement will not insulate an employer's unlawful and predetermined tactic in achieving it.<sup>110</sup>

GE relied heavily on *Insurance Agents International Union, supra*, which found that the policy of Congress was "to impose a mutual duty upon the parties to confer in good faith with a desire to reach an agreement."<sup>111</sup> However, nothing stated by the court may reasonably be said to place its imprimatur on the action of an employer who entered negotiations with its mind cast against any change. The contrary is true. The court interdicted conduct that reflects a predetermined resolve not to budge from an initial position. The "willingness to agree" test of good faith was first established during the very early Board cases, and at a time when it was primarily concerned with the organizational and developmental stages of collective bargaining.<sup>112</sup>

The modern and ingenious devices of Boulwarism were not before the Labor Board in the earlier cases which dealt with the issue of the employer's intent or desire to reach an agreement. There is little doubt that had the Board dealt with the Boulware formula in the earlier years that Boulwarism would have met with a similar fate. In *Atlas*, for example, the

---

108. *Id.* See *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953); *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 637 (4th Cir. 1940); See also Duvin, *Duty to Bargain: Law In Search of Policy*, 64 COLUM. L. REV. 248, 265 (1964); see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1419 (1958); 76 HARV. L. REV. 807, 812-13 (1963).

109. 418 F.2d at 761.

110. See Address by Board Member Fanning, Ninth Annual Institute on Labor Law, Oct. 19, 1962, 51 L.R.R.M. 87, 88 (1963).

111. *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. at 488.

112. *NLRB v. Atlas Mills, Inc.*, 3 N.L.R.B. 10 (1937); *NLRB v. Highland Park Mfg. Co.*, 12 N.L.R.B. 1238 (1939), enforcing 110 F.2d 632 (4th Cir. 1940). See 43 TEXAS L. REV. 974, 976 (1965).

first of the cases that dealt with the "willingness to agree" standard, the Board stated that if the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation.<sup>113</sup>

The first annual report of the Board declared that:

Collective bargaining is something more [than] the mere meeting of an employer with the representatives of his employees; the essential thereof is rather the serious intent to adjust differences to reach an acceptable common ground.<sup>114</sup>

Professor Duvin delivered a most appropriate eulogy to the "willingness to agree" standard: "When restated in the light of modern industrial society it is exposed as 'an antediluvian ineffective, legal standard which obstructs rather than implements labor policy'."<sup>115</sup>

### *Section 8(c) as a Defense to GE's Communication System*

In defense of its right to engage in its massive communication program, GE advanced the proposition that Section 8(c)<sup>116</sup> prohibits the Board from grounding an unfair labor practice on communications that contain no threat of reprisal or force or promise of benefit. Absent the conduct proscribed by Section 8(c) the right of an employer, GE argues, is privileged and as such is protected under the Act. This absolutist concept of 8(c) found some support in the dissenting opinion of Judge Friendly. There was nothing wrong, according to the dissent, "in an employer's urging employees to communicate with their representatives simply because the communication is one the representatives do not want to hear."<sup>117</sup> This parochial view of 8(c) cannot be squared with the legislative history behind that section.<sup>118</sup> Moreover, it would render incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law, with consequences for the entire administration of the Act too dire to contemplate.<sup>119</sup> Its effect

113. 3 N.L.R.B. at 21.

114. 1 NLRB ANN. REP. 85-86.

115. Duvin, *The Duty to Bargain: Law In Search of Policy*, 64 COLUM. L. REV., 248, 265 (1964).

116. Section 8(c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

117. 418 F.2d at 771, 772.

118. 1 LEG. HIST. 1541. See analysis of the legislative history cited in Judge Kaufman's opinion at 760 and the analysis of the Trial Examiner at 281. See also *IBEW v. NLRB*, 341 U.S. 690, 701 n.6 (1951).

119. "The problem is essentially to determine from the record the intention or the state of mind of respondents in the matter of their negotiations with the union." *NLRB v. National Shoes, Inc.*, 208 F.2d 688, 691 (2d Cir. 1953); *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 266 (2d Cir. 1963).

would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent.<sup>120</sup>

Where no coercive speech is found to have been used in furtherance of an unlawful purpose, the immunities of Section 8(c) do not apply. To put it conversely, noncoercive speech is protected under 8(c) only when in furtherance of a lawful object. The Supreme Court enunciated the rule of law that "the remedial function of Section 8(c) is to protect noncoercive speech by employer and labor organizations alike *in furtherance of a lawful object*."<sup>121</sup> (Emphasis added).

Establishing the purpose of any given conduct of the employer, including communications, oral or written, is of critical importance in determining the good faith of an employer before or during bargaining sessions. As Mr. Justice Frankfurter stated: "The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case and, on the sufficiency of the whole record to justify its decision, the Courts must pass."<sup>122</sup>

As pointed out, *supra*, where an employer's state of mind including motivation is in issue, it can only be established by circumstantial evidence. Discriminatory discharge cases, for example, involving violations of Section 8(a)(3) almost always include evidentiary examination of admissions, opinions or views in the determination of bias or motive in effecting discharge. A violation of Section 8(a)(5) which proscribes individual bargaining and which depends completely on such evidence, could not be proved if the Board was bound by the absolutist concept of Section 8(c). To examine the issue in its broadest terms, it would not be unreasonable to suggest that if an employer's views and other declarations cannot be used as evidence by the strict application of such restrictions, establishing an unfair labor practice would well nigh be impossible.<sup>123</sup>

---

120. In construing violations of Section 8(b)(4)(A), the Labor Board said that to qualify that section by the so-called free speech provisions of Section 8(c) "would practically vitiate its underlying purpose and amount to imputing to Congress an unrealistic approach to the problem." 81 N.L.R.B. at 812. Quoted with approval in *IBEW v. NLRB*, 341 U.S. at 704.

121. *Id.* See "Boulwarism" *Legality and Effect*, 76 HARV. L. REV. 807, 815 (1962). See also 40 N.Y.U.L. REV. 798, 799 (1965). *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

122. *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. at 508. See also 63 NW. U.L. REV. 40, 70 (1968).

123. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944); see 76 HARV. L. REV. 807, 814 (1962).

### Conclusion

Boulwarism as invalidated by the Court had two major facets to its bargaining method, the "fair, firm" offer and its communications program. The former standing alone falls far short of meeting the statutory requirements of good faith bargaining, because it represents a bargaining approach that excludes meaningful union participation in the bargaining process, reduces the union's role to that of an advisor, and reserves to the employer the unilateral responsibility for determining the terms and conditions of a collective agreement. Moreover, the "fair, firm" offer embraces a predetermined resolve not to budge from its initial tender and, except for insubstantial alterations designed merely as window dressing, is in effect a "take-it-or-leave-it" position that is patently inconsistent with the good faith bargaining requirements of the statute.

Furthermore, one of the intended by-products of Boulwarism is the emasculation of the union's countervailing power and, if given acceptance, de jure or de facto, it could undermine the structure of a free democratic industrial society within which the statute must function.

### *In Response to Morris David Forkosch*

Following the completion of this paper, Professor Forkosch graciously consented to the submission to the writer of his companion article, *Boulwarism: Will Labor-Management Relations Take It Or Leave It?*<sup>124</sup> His paper contains some conclusions which merit a more extensive discussion than an addendum would normally permit.

Professor Forkosch refuses to join those who mourn the demise of Boulwarism for a valid reason. He believes it is still alive and moreover that it does not deserve the fate intended by the Labor Board and the Second Circuit. He questions whether it was "judicially rejected" and whether it was significantly altered, if at all. He concludes that "as of now a good deal, if not all, of Boulwarism's tactics are still available, albeit to be used cautiously."<sup>125</sup> To support this conclusion, Professor Forkosch correctly suggests it is necessary that GE's overall plan, its technique and conduct, be set forth in some detail, to be analyzed in the light of the opinions and holdings of the Trial Examiner, the Labor Board and the Court. What follows this threshold promise however is a scholarly analysis of the applicable cases with a less than modest treatment of the facts. The controlling consideration in most cases in determining bad faith bargaining is

---

124. 19 CATHOLIC U.L. REV. 311 (1970).

125. *Id.*



the facts, and as the Supreme Court in *Truitt* reminded us, each case must turn on its facts.<sup>126</sup> In the Boulware case the facts and findings were crucial in determining the legal issues involved, for which reason they are so generously treated in this paper.

While the decision of the Court does raise some questions concerning its reach, there can be no doubt that the bargaining technique embraced by Boulwarism was found to be unlawful. "We hold that an employer may not so combine take it or leave it bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken."<sup>127</sup>

The question raised by this holding is not whether the Court rejected Boulwarism, but rather the extent and nature of the conduct proscribed. Specifically, did the Board and the court treat the Boulware overall bargaining technique separate and distinct from the three other separately enumerated violations. To put it more directly, absent any of the separate violations, would the Board and the court have held the overall Boulware technique an unlawful bargaining method?

That the Trial Examiner found the "fair, firm offer" bargaining method unlawful is clear from his Intermediate Report: "The course the Respondent chose amounted in effect to a unilateral determination of employment terms, leaving negotiations thereafter, unless it deviated from its own policies—an empty exercise with predetermined results."<sup>128</sup> In a note to that statement, the Examiner continued:

It may well be that any other course would have confronted the Respondent with practical procedural difficulties in achieving its aim for substantial contract uniformity in its multiple union relationships. That aim, however, while entirely legitimate in itself, cannot be elevated to a principle excusing noncompliance with good-faith bargaining procedures. Just because the Respondent might find it procedurally inconvenient or impracticable to realize its uniformity goal by engaging in full bargaining with *all* unions before freezing its offer is no justification for its failure to bargain with any one union—and particularly the IUE, by far the largest union in its chain. . . . Effectuation of the Respondent's private policies cannot be made paramount to the Act's command.<sup>129</sup>

That footnote illuminates one of the company's motivations in adhering rigidly to its predetermined offer. Its reach extended not alone to the

---

126. *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153.

127. 418 F.2d at 762.

128. 150 N.L.R.B. at 272.

129. *Id.* at n.66.

charging union, the IUE, but to all unions.

Any extended discussion of refined case distinctions and of peripheral legalistic abstractions serves only to obscure the central issue in the case. The central thrust of the issue is contained in the following unchallenged key findings of the Labor Board.

As the record in the case reflects, Respondent regards itself as a sort of administrative body which has the unilateral responsibility for determining wages and working conditions for employees, and regards the union's role as merely that of a kind of advisor for an interested group—the employees.<sup>130</sup>

And:

“Collective bargaining” as thus practiced is tantamount to mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an advisor.<sup>131</sup>

At issue is a method of “bargaining” relentlessly applied to each of the 100 unions representing employees in every corner of the country, where presumably the bargaining issues as well as the countervailing bargaining powers of each union would vary, and to each of which, notwithstanding such differences, the identical “fair, firm” offer is made and successfully imposed. No amount of tortuous distinctions between cases can support the conclusion that such a method meets the bare good faith bargaining requirements of the law.

In making an offer or acting on a union proposal, employers generally take into consideration certain factors. These uniformly will include competitive conditions within a given industry and an appraisal of the union's countervailing economic powers. As stated above, GE is the most diversified company in the United States, manufacturing products in 123 lines, including almost every basic industry, and it deals with about 100 unions. Within these industries, competition varies considerably.<sup>132</sup> Yet, despite these bargaining considerations which would normally produce variegated offers, GE makes an identical offer to each of these unions and has made them stick. It would do violence to reason to accept the suggestion that these results could be accomplished through bargaining methods that meet the statutory standards.

---

130. 150 N.L.R.B. at 195.

131. *Id.* at 195, 196.

132. The following will serve as a few examples of the industry diversification of GE products: wood cabinets, business service publications, gravure printing, plutonium atomic fuels preparation, industrial paints, glass, porcelain insulators, iron castings, carbon and alloy steel castings, oil and gas fired furnaces, utility, industrial and marine steam turbines, man-made diamonds, motors, generators, jet engines, aircraft propellers, railroad locomotives, house appliances, television.

Professor Forkosch raises the question as to whether the Court could properly use either or both TILI offers as supporting evidence of a general bad faith charge without independent proof of a TILI. He argues that the insurance TILI offer is to be considered as an objective fact, regardless of intent, motive or state of mind, while on the other hand the Boulware overall violation is purely subjective. He then concludes that a TILI offer therefore requires language *in haec verba*, oral or written, as an exhibit to be the basis of a finding of fact, a factor not present in the overall Boulware approach.<sup>133</sup>

The laboratory test required by Forkosch in effect postulates the unique proposition that this element of bad faith bargaining under discussion, *i.e.*, the predetermined TILI of an employer, may not be the subject of a Board finding unless the employer included the TILI in an oral or written confession. Even if this extraordinary rule of evidence had some case authority or other support, GE's TILI has even met that standard unless we challenge the well established authority of the Board to draw inferences from GE's Lavish use of the TILI's counterpart, the "fair, firm" offer and the totality of circumstances within which it is put to use.<sup>134</sup>

Forkosch's underlying premise that a TILI in the insurance plan is an objective fact, whereas in the overall violation it is subjective, is an interesting comment, but it surely has no evidentiary value. The Board just as frequently as not makes findings by the application of subjective or circumstantial tests, including findings as to the motive or state of mind of an employer.<sup>135</sup> Cases are legion where the Board in discriminatory discharge cases has decided that the mere existence of a valid ground for a discharge is no defense, if such ground is pretextual.<sup>136</sup> In making a finding of pretextuality the Board may have an objective test such as a written instrument or it may have to examine all the circumstances and probe the employer's mind, depending on the circumstances in the case. However, whatever those circumstances may be, the Board's authority to make ap-

---

133. Vernon, *Business Combinations and Collective Bargaining Agreements*, 19 CATHOLIC U.L. REV. 1, 17-18 (1969). But see Forkosch, *Take It Or Leave It as a Bargaining Technique*, 18 LAB. L.J. 676, 693 n.70 (1967).

134. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

135. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139-140. See 76 HARV. L. REV. 807, 813 (1962); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. at 1418.

136. *NLRB v. Universal Packing Corp.*, 361 F.2d 384 (1st Cir. 1966); *NLRB v. Lippman*, 355 F.2d 15 (1st Cir. 1966); *Nachman Corp. v. NLRB*, 337 F.2d 421 (7th Cir. 1964); *A.P. Green Fire Brick Co. v. NLRB*, 326 F.2d 910 (8th Cir. 1964); *NLRB v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352 (2d Cir. 1962); *NLRB v. Whittin Mach. Workers*, 204 F.2d 883 (1st Cir. 1953); *NLRB v. Solo Cup Co.*, 237 F.2d 521 (8th Cir. 1956); *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725 (2d Cir. 1954).

propriate findings based on substantial evidence is beyond cavil.

There is strong authority for the proposition that the Board may take judicial notice of its findings in antecedent cases as part of the totality of circumstance in determining the good or bad faith of an employer.<sup>137</sup> That being the rule, *a fortiori*, it may consider findings made in the same case *sub judice*. Moreover, the Board may consider conduct which in itself is protected activity but when considered in conjunction with other bad faith conduct or in the light of the total circumstance may add up to unlawful conduct. As Mr. Justice Frankfurter expressed it, "The plan may make the [protected] parts unlawful."<sup>138</sup>

The ultimate issue in any Section 8(a)(5) charge is whether the respondent considering the totality of his conduct is guilty of bad faith in bargaining. Good faith or the lack of it is a question of fact as to a state of mind to be determined by the Board.<sup>139</sup> If, therefore, GE's overall conduct was such that the Board can infer or conclude that the "fair, firm" offer was the substantial equivalent of a take-it-or-leave-it predetermined offer from which it would not budge, it may so find and the courts are bound by such a finding if supported by substantial evidence.<sup>140</sup> Con-

---

137. In *NLRB v. Reed and Prince Mfg. Co.*, 205 F.2d at 139, 140, the Court stated the following:

. . . We do not think it would be error, in a case like this, for the Board to take account of the prior history of the Company's labor relations, as disclosed in the prior record of which the Board might take judicial notice. The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence. It is similar to the inquiry whether an employer discharged an employee for union activity, or for some other reason, where the prior history of the employer's labor relations, whether good or bad, may be relevant.

See *Local 833, UAW v. NLRB*, 300 F.2d 699 (D.C. Cir. 1962). Here the Court reversed the Board's finding that Kohler bargained in good faith during the 1954 negotiations because that finding viewed said negotiations in isolation, ignoring the company's pre-1953 history of anti-union activities and the commission of three unfair practices designed to frustrate the operation of the grievance procedure that was established as a result of the 1954 negotiations. The Court said:

. . . [t]he Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954.

. . . .

Only compelling circumstances could justify disregarding the 'antecedent' events in this record-repeated unlawful interference with employees' attempts to organize an independent union and public expressions of hostility to it. . . .

*Id.* at 706.

138. *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. at 506.

139. *United Steel Workers v. NLRB*, 405 F.2d 1373, 1376 (D.C. Cir. 1968).

140. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Fifth Circuit had this to say about the availability of objective standards for determining good faith bargaining: "The Truth is that objective standards are generally unavailable or un-availing." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

gress entrusted the Board, not the courts, with the power to draw inferences from the facts.<sup>141</sup>

If the slavish adherence to precedents would produce results that may do violence to the purposes of a statutory scheme, they should be abandoned. Nor should acronyms like TILI induce stock conclusions without reference to the entire course of conduct of the employer using it. Mr. Justice Cardozo put it aptly: "Weasel words will not avail to defeat the triumph of intention when once the words are read in the setting of the whole transaction."<sup>142</sup>

This brings us to a most grievous error in Judge Friendly's dissent, which receives the unqualified approbation of Professor Forkosch. The professor would approve Judge Friendly's denial of enforcement because many of the principles in the 1969 negotiations are allegedly no longer on the scene and because "it is scarcely possible that the company's actions are so nearly parallel to those of 1960. . . ."<sup>143</sup> To support this conclusion, the professor recites the facts of the 1969 negotiations as he understood them from his reading of the newspapers, a hazardous, if not totally unreliable, basis upon which to urge the dismissal of a case.

It is the most basic hornbook law that an appellate court may not speculate on facts outside the record on appeal, except where the doctrine of judicial notice is applicable.<sup>144</sup> Contrary to Judge Friendly's speculation of facts and those outlined in the professor's paper,<sup>145</sup> GE not only adhered to its formula in the recent negotiations but did so in a more egregious form<sup>146</sup> and this was the basis of charges filed with the Second Region of the Labor Board and docketed under case number 2-CA-11911 on the day before the Court's decision was handed down, October 28, 1969.

Nor can the writer join with the professor in his judgment that the 1969 negotiations resulted in a New Boulwarism presumably based on press reports that "hard bargaining" produced the February 4, 1970, settlement after several offers by the company. It would serve no useful purpose to deal with the 1969 bargaining in detail. The encapsulated facts are: GE's contracts with most unions it dealt with were due to expire on October 26, 1969. Pre negotiation discussions on the IUE's demands started in May 1969. Formal negotiating sessions with IUE's coordinated bargaining com-

---

141. *NLRB v. Link Belt Co.*, 311 U.S. 584, 597 (1941).

142. *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324, 336 (1937).

143. 418 F.2d at 774.

144. See 4A C.J.S. *Appeal & Error* §§ 680, 702 (1957); *ICC v. J-T Transport Co.*, 368 U.S. 81 (1961); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

145. 19 CATHOLIC U.L. REV. 345-50.

146. See n.15 *supra*.

mittee began on August 12, 1969. Long before that date the union gave GE its proposals including 122 contract changes. After five months of listening sessions, GE handed the union its complete "fair, firm" offer on October 8, 1969.<sup>147</sup> The day before, the company had already released the offer through its official news publication. GE adhered to its offer until October 26, the day after which all of the unions representing 150,000 employees struck.

On December 6, 1969, the company handed the union an "alternative" offer.<sup>148</sup> On January 9, 1970, J. Curtis Counts, the Director of the Federal Mediation and Conciliation Service, entered the negotiations.<sup>149</sup> From August 12, 1969, until January 9, 1970, the tenth week of the strike, therefore, GE had made its October 8, 1969 offer and its alternative offer of December 6, 1970. This was Boulwarism in true form. Beginning with January 9, 1970, except for one committee meeting with the company, the negotiations were conducted through the mediator until the fourteenth week of the strike when GE decided to abandon Boulwarism. Boulwarism, therefore, was shattered only after and as a result of 14 weeks of a nationwide strike.

Whether or not Boulwarism will be resurrected for the next round of negotiations or a New Boulwarism created in its place only the future will tell. However, the lesson to be learned from the 1969-1970 strike is that Boulwarism cannot function effectively when the balance of bargaining power is restored through the coordinated bargaining of the unions it deals

---

147. The offer has been publicly referred to as the October 7, 1969, offer because it bore that date. It was not given to the bargaining committee until October 8, 1969.

148. See *Unity*, the official publication of the Coordinated Bargaining Committee, Vol. 2, No. 6, at 4. This issue published the log of the bargaining events. The October 8, 1969, offer included a wage offer of 20 cents per hour increase for the first year, and a right to reopen the contract the second and third years. The alternative offer on December 6, 1969, filled in the second and third year reopeners with three per cent each year. The Company termed its second offer as an alternative leaving the union to choose the first or the second. The Boulware formula allows for insignificant changes or alternative offers. See 418 F.2d at 758.

149. During previous negotiations, GE generally abjured "intervention" by the Federal Mediation and Conciliation Service which it charged off to union invitation and weakness. Federal intervention was not considered "new facts" as any development or reason to change its offer. 71 LAB. REL. REP. at 195. Boulware belittled Federal intervention. Their mere "availability" was "the next most effective detriment to any meaningful negotiations." L. BOULWARE, *supra* note 13, at 141. Boulware boasts that he was able "to avoid the needless delay in settlement" by keeping the Federal Mediation Service out, but was compelled by law to accept their services when the union sought its intervention. *Id.* at 142. He considered Federal mediators as nuisances who would occasionally ask for "some little something" to serve the union official's purposes. *Id.* at 143; see 418 F.2d at 743. The fifteen week strike, however changed GE's opinion about mediators. Mr. Counts was welcomed and given credit for making an important contribution to the settlement. See Wash. Post, Feb. 9, 1970, at 16.

with.<sup>150</sup> In the final analysis it was this aggregate of countervailing union power that served as the inducement for GE to abandon its "fair, firm" offer in the fourteenth week of the strike.

---

150. IUE's right to coordinate its bargaining with all other unions having contracts with GE was litigated in 1966. GE bargained with a coordinated bargaining committee only under order of the Court. See *McLeod v. General Elec. Co.*, 257 F. Supp. 690 (S.D.N.Y. 1966) (Sec. 10(j) proceeding), *rev'd on other grounds*, 366 F.2d 847 (2d Cir. 1966), *cert. granted and case remanded*, 385 U.S. 533 (1967). The issue was later litigated on the merits and IUE's right to coordinate its bargaining with other unions was upheld. *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969) *enforcing* 173 N.L.R.B. 46. For a review of the law on coordinated bargaining by unions, see Abramson, *Coordinated Bargaining By Unions*, Proceedings, N.Y.U. 20th ANNUAL CONF. ON LABOR, 231-52. See also Benetar, *Coalition Bargaining Under the NLRA*, N.Y.U. 20th ANNUAL CONF. ON LABOR 219-29.